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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of	)	
	)	
Implementation of the	)	
Pay Telephone Reclassification and	)	
Compensation Provisions of the	)	CC Docket No. 96-128
Telecommunications Act of 1996	)	

To: The Commission

**COMMENTS OF METROCALL, INC.
IN SUPPORT OF PETITIONS FOR RECONSIDERATION**

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SUMMARY

Metrocall concurs with and supports many of the petitions for reconsideration of the FCC's payphone compensation rules. It is significant to note that despite the broad diversity of these petitioners, they reach essentially the same conclusions: (1) the default rate of 28.4 cents is far too high, it does not accurately represent the true costs of a variety of access code and 1-800 calls, and it will overcompensate PSPs; (2) many of the FCC's conclusions are grounded on the false presumption that payphone call blocking and call tracking is widely available; (3) fair and just compensation to PSPs should be based on accurate cost studies for each unique type of payphone call; and (4) the FCC's current payphone rules will lead to ruinous telephone charges for many businesses and consumers, and will invite telephone fraud.

In creating another regulatory structure that covers a broad cross-section of the telecommunications industry, the FCC has utterly failed to consider the unique characteristics of the paging industry. Metrocall's Comments explain why the FCC's payphone compensation rules will have a particularly harmful financial and operational impact on the paging industry, and why these rules will lead to incessant litigation before the FCC and the courts unless they are reconsidered and substantially revised.

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COMMENTS OF METROCALL, INC. IN
SUPPORT OF PETITIONS FOR RECONSIDERATION

Metrocall, Inc., through its undersigned counsel, and pursuant to Section 1.429(e) of the FCC's Rules, hereby respectfully submits these Comments in support of requests for reconsideration of certain provisions of the Second Report and Order ("Second Order") in the above-captioned rulemaking proceeding.

I. Statement of Interest

Metrocall is the second largest paging company in the nation (NASDAQ trading symbol: "MCLL"). Through its licensee-subsidiary, Metrocall USA, Inc., Metrocall provides commercial radio paging services throughout most of the United States. Through its corporate predecessors, Metrocall has provided paging services for more than a decade, and it continues to undergo tremendous growth. Metrocall currently serves more than four million paging units over its facilities, and is actively pursuing business plans to increase its customer base nationwide.

Metrocall is a member of the Personal Communications Industry Association ("PCIA"); Metrocall's President and Chief Executive Officer, William L. Collins III, is the Chairman of

PCIA. On behalf of the paging industry, PCIA and others petitioned the U.S. Court of Appeals for the D.C. Circuit to review the FCC's Order on Reconsideration concerning its payphone compensation rules.[1] The FCC's Second Report and Order, CC Docket no. 96-128 (October 9, 1997) addressed some of the issues that were remanded to the agency by the D.C. Circuit. The Second Report is now the subject of pending appeals and these petitions for reconsideration. Metrocall, through its membership in PCIA, has been an interested party throughout these payphone compensation rulemaking proceedings, and hereby submits these comments in support of certain of the petitions for reconsideration.

II. Summary of the Petitions

Metrocall will briefly summarize only those petitions and issues that it is supporting in these reconsideration proceedings.

PageMart, a paging carrier, has asked the FCC to adopt a measured rate, rather than a per call default rate, for payphone compensation. PageMart Petition at pp. 3-6. PageMart also asked the FCC to reconsider its decision to impose these payphone charges on carriers, rather than the calling party. PageMart Petition at pp. 6-8. PageMart also asked the FCC to reconsider and adopt AirTouch Paging's proposal, which would allow a new "8XX" code for callers willing to pay for all payphone originated calls. PageMart Petition at 8-9.

The Direct Marketing Association ("DMA") petitioned the FCC to reconsider its decision to adopt one uniform default rate for all payphone originated calls. DMA explained that

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[1] Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecom. Act of 1996, *Order on Reconsideration*, 11 FCC Rcd. 21233 (1996) ("Reconsideration Order"); *rev'd and aff'd*, Illinois Public Telecommunications Ass'n v. FCC, 117 F.3rd 555 (D.C. Cir. 1997).

subscriber 800 calls should not be treated the same as other compensable payphone calls. DMA stated that the FCC's rules "fail[] to ensure that cost recovery is tied to cost causation", and that the FCC's rules require toll-free subscribers to subsidize all types of payphone calls. DMA Petition at pp. 4-6.

Paging Network, Inc. ("PageNet"), a paging carrier, petitioned the FCC to adopt a payphone compensation rate that is based on measured increments of use. PageNet's proposal is akin to PageMart's in that a default rate based only on a completed call fails to consider the typically shorter duration of payphone calls placed to paging networks.

A consortium of telephone answering service companies (the "Dispatching Parties") have petitioned the FCC to adopt a "calling party pays" plan somewhat akin to the one proposed by PCIA and other members of the paging industry throughout these rulemaking proceedings. The Dispatching Parties point out that the FCC's rules invite fraudulent calling practices, without adopting any means of guarding against payphone fraud. Dispatching Parties Petition at 3-5.

Source One, a paging carrier, explained that the FCC's assumptions are faulty, in that interexchange carriers ("IXCs") have "neither the technological ability nor the economic incentive to block calls." Source One Petition at pp.3-4. Consequently, the FCC's "carrier pays" system will not lead to market-based competitive payphone rates. Also, if a caller is not charged for these payphone calls, Source One observes, there are no incentives for payphone providers to offer "competitive" calling rates. Id. at p. 4. Accordingly, Source One has petitioned the FCC to adopt calling party pays rules akin to those that the paging industry has promoted.

Mobile Telecommunication Technologies Corp. ("Mtel"), a paging carrier, stated that the FCC's "market-based" rate assumptions were inherently flawed, or undermined by related FCC actions. For instance, though the FCC claimed that "call blocking" gives customers the ability to avoid payphone charges, the agency negated that option by granting the LECs and payphone service providers ("PSPs") a waiver of the requirement that they give each other the coding information necessary to block and track these calls. Mtel Petition at pp. 1-6. Mtel also petitioned the FCC to reconsider its 28.4 cent "default rate", because that rate was improperly based on an assumed "market" rate of 35 cents per payphone call, and, the default rate did not account for different types of payphone calls. Mtel Petition at pp. 6-8.

The "Consumer-Business Coalition for Fair Payphone-800 Fees" contends that the FCC's rules violate Congress' mandate, because the default rate unfairly overcompensates PSPs for 1-800 and access code calls. Coalition Petition at p.1. The Coalition submitted numerous declarations from its members that aver how the FCC's rules will cause them to suffer "severe and unwarranted" adverse financial consequences. Instead of the 28.4 cent default rate, the Coalition asked the FCC to adopt an "incremental cost-based" rate, that would be no more than 6 cents per payphone call. Coalition Petition at p.1.

AT&T Corp.'s petition is similar to the Coalition's. AT&T states that the FCC's linking of a coinless call rate to local coin rates was irrational, unsupported by record evidence, and not endorsed by the U.S. Court of Appeals. AT&T Petition at pp. 3-7. AT&T also contends that the FCC's cost assumptions are badly flawed because they were based on inaccurate cost data derived from only a minority of PSPs. AT&T Petition at p.12. AT&T submits that the FCC must review previously missing LEC payphone cost data before it can even attempt to determine the "true" costs of these calls. AT&T Petition at pp. 13-16. And, AT&T points to a number of other factors that resulted in a default rate that unfairly overcompensates PSPs. AT&T Petition at pp. 16-19.

III. The FCC's Rules will Harm the Paging Industry

Metrocall concurs with and supports all the forgoing petitions for reconsideration. It is significant to note that despite the broad diversity of these petitioners, they reach essentially the same conclusions: (1) the default rate of 28.4 cents is far too high, it does not accurately represent the true costs of a variety of access code and 1-800 calls, and it will overcompensate PSPs; (2) many of the FCC's conclusions are grounded on the false presumption that payphone call blocking and call tracking is widely available; (3) fair and just compensation to PSPs should be based on accurate cost studies for each unique type of payphone call; and (4) the FCC's current payphone rules will lead to ruinous telephone charges for many businesses and consumers, and will invite telephone fraud.

Metrocall will not repeat any of the factual or legal arguments that have already been well-pled by these petitioners. Instead, Metrocall would like to point out to the FCC some of the fundamental problems its new payphone rules have already caused the paging industry.

Presumably, Congress should take responsibility for a fair amount of the trouble this payphone proceeding has caused the FCC, and indeed the Nation at large. It was Congress that gave the FCC an arbitrary nine-month deadline to "fix" a problem that is evidently not open to easy solutions. The desire of this agency to attempt some swift, albeit rough, justice within those statutory constraints and move onto the next Telecom Act deadline would be understandable.

Nevertheless, in creating yet another regulatory structure that covers a broad cross-section of the telecommunications industry, the FCC has utterly failed to consider the unique characteristics of the paging industry. Metrocall will explain herein why the FCC's payphone compensation rules will have a particularly harmful financial and operational impact on the paging industry, and why these rules will lead to incessant litigation before the FCC and the courts unless they are reconsidered and substantially revised.

IV. The Default Rate is Far Too High for Paging Customers

The petitioners have all made compelling arguments as to why the FCC's default rate should be reconsidered: it is not cost-based, it is not based on a measured call, it was based on rates that have nothing to do with access code and 1-800 calls. In addition to these sound arguments, there is a very practical reason why the FCC ought to reconsider its default rate: most 1-800 paging customers simply won't pay this charge; it is much higher than the market will bear.

A pocket calculator is all that is necessary to determine that the FCC's payphone default rate will unfairly burden paging customers with exorbitant charges. A typical 1-800 paging customer pays a flat fee, depending on the size of the service area, of approximately $25 per month for "basic" paging service (voice mail access and other services are typically added charges). If that paging customer receives on average only five calls per day from a payphone (which must be considered a very low estimate), this will cause her monthly basic pager charge to increase by an additional $45, nearly tripling the customer's basic rate. Even with as little as two payphone calls per day, the FCC's default rate will add nearly $20 per month to a paging customer's bill, with absolutely no added services or benefits for the consumer. At these cost levels, it does not take an economic degree to figure out that paging customers will soon question whether their service remains a cost-effective alternative to monthly cellular telephone or PCS service. If paging carriers begin losing their customers due to these increased costs, it will not be due to "market" forces, but rather, FCC regulatory edict.

It is unlikely that paging carriers will have the financial wherewithal to absorb these exorbitant charges. The majority of the nation's top-10 paging carriers have been operating at break-even levels or worse for the past few years. And, with more than a dozen facilities-based paging carriers competing against each other in most major markets, brutal price competition hampers the ability of any carrier to raise its rates to cover these payphone charges.

A cynical response would be that the FCC has no obligation to ensure that the paging industry is profitable or that it can provide service to millions of paging customers at reasonable rates. But, there are statutory limits to such a *laissez faire* economic approach. Payphone service providers are subject to Title II common carrier obligations, including the obligation to provide service at "just and reasonable" rates, terms and conditions. See 47 U.S.C. §201(b). Congress' directive to the FCC to adopt rules for "fair compensation" to PSPs, does not override the FCC's statutory duty to ensure that those payphone rates are just and reasonable.

Metrocall submits that any payphone rate that will lead to the tripling of a paging customer's monthly charges, or, ruinous losses for the paging carrier that elects to absorb those charges to preserve its customer base, is perforce unjust and unreasonable. And, that is precisely the impact that the FCC's payphone rates will have on the paging industry. The "default" rate is far from just and reasonable for paging customers; hence, the FCC should reconsider it and dramatically reduce it consistent with the recommendations made in the petitions for reconsideration.

V. The "Call Blocking" Assumption was Erroneous And Should be Reconsidered

Most of the petitioners have explained that the FCC's basic assumptions concerning the ability of carrier's to "block" 1-800 payphone calls are utterly false. Mtel aptly argues that even if these assumptions were true and all IXCs could block these calls, the FCC has given the LECs and PSPs until March of 1998 before they are even required to provide IXCs with the codes necessary to block these calls. Yet, the FCC has not "waived" the obligation to immediately begin paying PSPs at the FCC's default rate, whether or not the calls can be blocked. It would be hard to imagine a more obviously contradictory pair of agency rulings.

Moreover, the U.S. Court of Appeals might be surprised to learn at this late date that these calls cannot be blocked at all payphone sites; that is not what the FCC and the LECs' previously told the Court. In fact, the Court specifically stated that it had "*no reason to doubt the FCC's conclusion* that the IXCs' potential to block calls gives them some leverage to negotiate [fair payphone compensation rates]." Illinois Public Telecom. Assoc. v. FCC, 117 F.3rd 555, 560 (emphasis added).

Every paging carrier in this Country today knows that all 1-800 payphone calls cannot be "blocked", despite what was said to the Court of Appeals. They know this because they have asked their IXCs to block these calls, and, the IXCs have said that only some of these calls can be blocked.

Moreover, the FCC's Common Carrier Bureau has had a role to play in this problem, which is causing unique hardships to many paging carriers. Not too long ago, as the nation's supply of 800 numbers began to erode, the Bureau recommended that paging carriers employ

"PIN code" 1-800 service, rather than issuing individual 800 numbers to each paging customer. Metrocall, for one, has thousands of customers in service who have PIN code access to 1-800 service. PIN codes allow many customers to essentially share one 800 number. The problem with PIN codes; however, is that it is impossible to block and/or track payphone calls to individual paging customers, since they are sharing one phone number. Hence, even after March of 1998, and even after all LECs and PSPs have installed the codes necessary to block and track payphone calls, PIN code customers will never be able to "block" incoming payphone calls. The FCC must reconsider its rules since "blocking" simply will not work for these customers.

Several petitioners have made sound legal arguments that the FCC cannot adopt rules that are blithely at odds with record evidence, and Metrocall concurs with those arguments. But, the FCC should be concerned with more than just another potential remand order from the Court of Appeals on this issue. At bottom, it is simply bad public policy for any agency to base its regulations on assumptions that the regulated industry knows to be false. Since the entire "carrier pays" scheme rests on the obviously false assumption that carriers have "leverage" over PSPs due to call blocking capabilities that do not exist, the FCC ought to revisit this crucial issue, and reconsider its conclusions.

VI. The "Carrier Pays" Rules are Causing Unjust and Unreasonable Billing Practices

Paging carriers who want to give their customers the option of accepting and paying for these calls are already facing unjust and unreasonable billing problems. First of all, the same network problems that preclude IXCs from blocking these calls, preclude them from being able to track these calls and timely bill them to the 1-800 user. Paging carriers already have to wait an average 60 days just for "normal" long distance telephone bills to arrive. Most IXCs cannot now predict how long it will take them to identify and itemize payphone calls placed to 800 paging customers, but, early estimates are that it will take an additional two to four months for paging carriers to receive this information. That means that if and when itemized payphone charges are available, paging customers may be receiving these bills for payphone charges more than six months after the charges are incurred, through no fault of the paging carrier.

This is not just a minor inconvenience for paging carriers and their customers; the FCC has found that billing delays of this magnitude could be considered "unjust and unreasonable" under Section 201(b) of the Communications Act. For instance, in The People's Network v. AT&T, __ FCC Rcd. __, 1997 FCC Lexis 1928 (April 10, 1997), the Common Carrier Bureau found that AT&T violated Section 201(b) of the Act when it "backbilled" a customer for services that had been rendered more than 120 days before the bill was issued. Indeed, the FCC did not "foreclose the possibility that backbilling of *less than 120 days could be found to be unjust and unreasonable under the facts of a particular case*." Id. at ¶ 18 (emphasis added). Hence, the FCC's payphone rules have created a likely scenario in which paging customers will file complaints against paging carriers, paging carriers will file complaints against IXCs, and IXCs will file complaints against PSPs, because of the inevitable delays that will occur when carriers try to track and bill 1-800 payphone calls.

In addition to these legal complications, it is simply absurd for the FCC to assume that, given these billing delays, paging carriers will be able to recover these enormous payphone charges from all of their customers. If the billing information is "stale", paging carriers will be stuck with enormous payphone charges that their customers will refuse to pay. The FCC hasn't even attempted to provide an answer to these problems that would not exist but for its "carrier pays" rule.

The FCC has left the paging industry entirely in the dark as to how it can legitimately "pass through" these charges to its paging customers. Moreover, the situation can only get worse once the FCC decides what to do about payphone charges dating back to October of 1996. With an average paging industry "churn" rate of 2% per month, it is reasonable to assume that fully 25% of the paging customers that might have incurred those payphone charges will have disappeared by the time these payphone charges are "passed through" to paging carriers.

The FCC's basic assumption about a carrier's "pass through" ability has no merit if the customer that incurs the charge cannot be timely located and billed. The FCC cannot ignore this problem, and assume that the "market" will correct it. The concept of timely and comprehensible billing is a statutory issue; common carriers are expected by law to render their bills to the paying customer in a timely manner. See, e.g., The People's Network v. AT&T; *and*, American Network, 4 FCC Rcd. 550 (C.C.B., January 12, 1989).

As of today, virtually no IXC can assure any paging carrier that they will be able to provide timely, itemized bills traceable to the paging customer. The FCC's "carrier pays" rule will force these IXCs to engage in unjust and unreasonable billing practices, and those billing practices will presumably be subject to numerous formal complaints before the FCC.

Other unjust and unreasonable practices are already occurring due to the FCC's rush to implement these unreasonable payphone rules. For instance, some IXCs have raised their long distance rates to "cover" PSP charges; but, the PSPs have not yet billed them for these services. It is self-evidently "unjust and unreasonable" for any carrier to bill a customer (the paging carrier) for a service where no cost is incurred by the billing carrier.

Some IXCs have announced that they will be "passing through" payphone charges, but at a "marked up" rate of 30 cents per call. The FCC's conclusion that IXCs will be able to "leverage" rates lower than the 28.4 cent default, has proven to be inaccurate in practice.

Most of these billing and collection problems could have been avoided if the FCC had simply adopted the "calling party pays" proposal. At a minimum, if the default rate were closer to the true costs of these payphone calls, even with "carrier pays", at least the extent of the problem in dollars and cents would be mitigated. In light of these myriad billing problems, and their attendant statutory violations caused in great part by FCC's rules, this agency ought to reconsider its "carrier pays" rule as well as its default rate.

VII. Adverse Impact on Small Businesses

Because of the pervasive use of 800 numbers and access codes in the paging industry, and the ubiquitous use of payphones to reach a paging unit, the problems inherent in the FCC's payphone rules are exacerbated for paging carriers. This is more than just a minor regulatory annoyance. Paging carriers have seen their long distance telephone bills double and triple in just the past month or two, all due to the FCC's rules. It is simply impossible for paging carriers to pass on all of these costs to their customers, or to absorb them, without financial peril or likely loss of customers.

It is appropriate and necessary for the FCC to consider this actual harm within the overall context of its purported regulatory goals. All of the FCC's new Commissioners have publicly restated this agency's commitment toward fostering opportunities in the telecommunications industry for small businesses, women, and minorities, and to eliminate regulatory burdens.[2] With few exceptions, most of the paging companies in the United States were started by small business men and women, many of whom are minorities. The FCC's payphone rules are unfairly imposing enormous financial and regulatory burdens on thousands of small businesses, our nation's paging carriers.

While Congress instructed the FCC to be "fair" toward payphone service providers, it did not inform the agency to be "unfair" to paging carriers. Unlike payphone service providers, paging licensees have paid more than their fair share of FCC regulatory costs throughout the years. They pay licensing fees, annual regulatory fees, TRS fund fees, penalties for non-compliance with FCC licensing rules, Universal Service fees, and FCC auction fees. At the local level, paging carriers are additionally paying state and local "wireless carrier" taxes, "right of way" fees, and the usual panoply of business taxes. Moreover, the cost of installing a payphone pales by comparison to the enormous costs involved in building, operating, and maintaining even the smallest of paging networks.

In return for all these regulatory expenses and burdens, the vast majority of paging carriers face brutal price competition in every major market throughout the U.S., something not experienced by any other class of carriers in this Country, including payphone service providers. Most paging carriers are operating at break-even levels or worse; it now takes several years to

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[2] See, e.g., "Implementation of Section 309(j) of the Communications Act," Notice of Proposed Rulemaking (MM Docket 97-234, *et al.*), *Separate Statements of Comm'rs Powell and Tristani* (November 26, 1997); *and*, "Amendment of Part 1 of the Commission's Rules, Competitive Bidding Proceeding," Third Report and Order (WT Docket 97-82, ET Docket 94-32), *Separate Statement of Comm'r Furchtgott-Roth* (December 18, 1997).

recover the infrastructure, operational and regulatory costs of building and running a paging network. Yet, paging carriers continue to hire new employees, and new customers are signing-up for paging service at an annual clip of more than 20 percent.

Throughout the past few years cable TV rates, local telephone rates, and indeed local payphone rates have all risen; yet, the paging industry, without any goading from the FCC or Congress, has consistently reduced or maintained its customer rates, while actually increasing the scope and ranges of services provided to all customers. The accomplishments of the paging industry, and this industry's commitment to quality service and customer satisfaction, are simply nonpareil in the telecommunications industry.

In light of these irrefutable facts, it is time for this agency to recognize the accomplishments of the paging industry, to consider the industry's unique needs and requirements, and to fashion regulations that will promote, rather than punish, this industry and its tens of millions of customers. There was no need for the FCC to adopt rules that were "fair" to payphone operators, but egregiously unfair to paging operators. On reconsideration, the FCC should take a broader look at the comparative impact its payphone rules will have on *all* sectors of the telecommunications industry, including the paging industry, and revise these rules to at least minimize their harm to the paging industry.

Conclusion

For all the foregoing reasons, Metrocall respectfully requests that the FCC grant the petitions for reconsideration consistent with the forgoing comments.

Respectfully submitted,

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I, Rhonda M. Johnson, a legal secretary in the law firm of Joyce & Jacobs, Attorneys at Law, L.L.P., do hereby certify that on this 7th day of January, 1998, copies of the foregoing Comments were sent by first-class U.S. mail, postage prepaid, to the following:

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* Via hand delivery

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